92-1672

Supreme Court, U.S.
FILED
MAR 17 1993
OFFICE OF THE CLERK

Case No. 92-

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1992

JOHN MUSSER, Petitioner,

v.

PASADENA UNIFIED SCHOOL DISTRICT,
CALIFORNIA STATE BOARD OF EDUCATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the decision of the California Court of Appeal violated petitioner John Musser's right to equal protection of the laws by holding that a ratification election (the final step under a California statutory "citizens' petition" process) to ratify the transfer of school district territory containing 71 homes with one (1) student out of the 21,600-student Pasadena Unified School District must, under the equal protection clauses of the United States Constitution and the California State Constitution [U.S. Const. Amend. XIV; Calif. Const. art. I, section 7], include all 109,000 electors of the PUSD where no discernible rights, duties, obligations, privileges of the 109,000 are affected?

Whether the determination of the California State Board of Education to authorize only the voters within the

territory to be transferred to vote in the "ratification election," a determination made under California Education Code Section 35756, is constitutional under the Equal Protection Clauses of the United States and California Constitutions as applied?

Whether, in order to satisfy the Equal Protection Clauses of the United States Constitution, all voters physically resident within a particular political subdivision of a state must vote in all elections on all matters touching any of the residents of that particular subdivision, regardless of the lack of any demonstrable link between the interests affected by the outcome of such an election and the voters themselves?

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OPINIONS BELOW

The opinion of the California Court of Appeals is reported at 9 Cal.App.4th 767 (1991) and appears as Appendix A to this Petition. The California Supreme Court's order dismissing petitioner's Petition for Review to that Court appears as Appendix B to this Petition.

JURISDICTION

The California Supreme Court entered its order dismissing its previously-granted review of the case below on December 17, 1992. The California Court of Appeal declared its decision below final on January 14, 1993. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Section 1257(a).

STATEMENT OF THE CASE

The California Court of Appeal (the "Court of Appeal") ruled that John Musser and the other 125 voters of a tiny slice of unincorporated Los Angeles County territory cannot complete their three-year trek to transfer their three blocks from the huge and distant Pasadena Unified School District ("PUSD") (which none of their children now attend or have attended for many years) to the closer and adjacent San Marino Unified School District ("SMUSD"). Now, in order to satisfy

the Court of Appeal's interpretation of the United States and California Constitution's equal protection provisions, all 109,000 voters in the PUSD must vote on the transfer. The Court of Appeal identified certain "interests" allegedly affected by the proposed transfer. The Court of Appeal pointedly fails to show any demonstrable link between those "interests" and the outcome of this territory transfer.

California law permits the reorganization of school districts by "Petitions by the Electorate." California Education Code Sections 35700 - 35766, attached as Appendix C hereto. As can be seen fror these statutes, particularly Education Code Section 35753, a petition must meet extensive and exacting criteria even to be considered.

A petition must contain valid signatures of 25% of the electors in a proposed territory to be transferred. Then, the local "Committee on School District Organization," a body elected by all the school districts in the

County, holds hearings and makes findings of fact. The procedure applicable at the time the Musser Petition was considered[1] provided for the local Committee to make a non-binding recommendation to the State Board of Education regarding granting or denying the petition. The State Board then heard and determined all such petitions.

In this case, Mr. Musser gathered signatures, enlisted the help of neighbors, presented his case before four local hearings and four hearings at the State Board of Education.

The State Board of Education, after its hearings, made multiple findings of fact (all of which have been sustained on appeal and are final), and reams of testimony and evidence, ruled that the Musser petition met <u>all</u> of the exacting criteria for a transfer and ordered an

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[1]The California legislature modified this procedure somewhat in 1991 by vesting more authority in the local Committee on School District Organization.

election to ratify the proposed transfer. Education Code Section 35756 requires the State Board to determine the election territory. The State Board limited the election to the transfer territory itself, finding on advice of counsel that other voters of the PUSD and SMUSD had no substantial interest in the outcome of the election.

The election was held. The transfer was ratified. The PUSD filed suit to set aside the election and the order calling the election. The Los Angeles Superior Court found that the State Board's limitation of the election territory survived under the "rational basis" test because no interests of the non-transfer territory voters were affected. Applying common sense and not the heated rhetoric of civil rights cases, the Superior Court held that legally disinterested voters had no constitutional right to vote in an election, the outcome of which had no measurable impact on them.

The Court of Appeal ruled otherwise. (A concise history of the case is found in the first pages of the Court of Appeal Decision.)

The Court of Appeal Decision

The Court of Appeal Decision (Appendix A hereto) upheld all findings of the State Board of Education (including the finding that the transfer would not "promote racial or ethnic discrimination or segregation") but overturned the transfer on equal protection grounds, holding that the limitation of the election territory to the 126 electors violated the right of the other 109,000 electors to vote. Although acknowledging that PUSD conceded the absence of any financial, curricular, physical or educational impact on the PUSD, the Court of Appeal identified only the following as "affected interests" of the 109,000 PUSD voters: morale and racial impact. The Court of Appeal never said what it meant by "morale," or whose morale it was protecting. Nor did it

explain how the transfer of one minority student from the 78%+ minority PUSD to the 50%+ minority SMUSD would have any demonstrable impact on racial balance. The Court of Appeal's holding on the alleged racial "impact" of this proposed transfer destroys the idea of any threshold required for a Court to act, in direct contravention of this Court's decision in Board of Education v. Dowell, 111 S.Ct. 630 (1991). The Court of Appeal simply threw out any requirement that there be consequences to an official act. Consequences are now either presumed or irrelevant.

California Supreme Court's Recent Decision on Point

On November 9, 1992, the California Supreme Court issued its decision in Board of Supervisors v. Local Agency Formation Commission, 3 Cal.4th 903, -- Cal. Rptr. --, -- P.2d -- (1992), which dealt with the issue of election territory delineation. It expressly

held that the Legislature holds plenary power overs its political subdivisions:

> The mere fact, however, that a state law touches on the right to vote does not necessarily require the application of strict scrutiny. (Burdick v. Takusi, (1992) 504 U.S. ___) Rather, "the 'compelling interest' measure must be applied if a classification has a 'real and appreciable impact' upon the equality, fairness and integrity of the electoral process." (Choudry v. Free, (1976) 17 Cal.3d 660, 664, quoting Bullock v. Carter (1972) 405 U.S. 134, 144.) As we now undertake to explain by reviewing federal precedent, section 57103's [the code section analogous to Education Code Section 35756] impact in the case before us falls well short of the "real and appreciable," for

> individual interests in voting are much attenuated by the state's plenary power to oversee and regulate the formation of its political subdivision, and the same power entitles the state to identify as differing in degree the interests of those who may vote . . . and those who may not.
>
> Board of Supervisors v. Local Agency Formation Commission, supra, 3 Cal.4th at 914.

Petitioner is at a loss to understand why their own Supreme Court first granted review, upheld the determination of a local agency to limit an election territory, then dismissed its review of this case on virtually identical facts and logically indistinguishable statutory schemes.

The interests of the non-transferees here are much more "attenuated" than those at stake in Board of Supervisors. How, then, can these

109,000 get to vote on a matter which impacts only Musser and his neighbors? They cannot without destroying Musser's right to vote.

The complete and total absence of any identifiable, cognizable interest of the 109,000 voters of the PUSD in the outcome of Musser's transfer ratification election compels this Court to overturn the Court of Appeal's decision. If not, John Musser and his neighbors have no right to vote. Lockport v. Citizens for Community Action, 430 U.S. 259, 41 L.Ed.2d 313, 97 S.Ct. 1047 (1977).

CONCLUSION

The California State Legislature empowered the California State Board of Education to act upon citizens' petitions to reorganize school districts. That power is severely constrained by the Legislature's extensive statutory requirements which all such petitions must meet. Only after these Herculean requirements are met, may the State Board even consider a transfer election. If it approves the

transfer, the matter is then submitted to the affected voters.

The Legislature also empowered the State Board to determine who would vote. In this case, the State Board authorized only those voters whose interests are affected to vote. The Court of Appeal says everyone gets to vote, whether affected or not. That decision is wrong, and it deprives John Musser of his right to vote as guaranteed by the equal protection provisions of the United States Constitution.

This Court should, accordingly, grant this Petition for Writ of Certiorari to vindicate Mr. Musser's right to vote.

March 16, 1993

Respectfully submitted,

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